

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

AMERICAN EMPIRE SURPLUS LINES  
INSURANCE COMPANY, as subrogee of  
FROCK BROS. TRUCKING, INC.

Plaintiff,

VS.

CUMMINS, INC.

Defendants.

Case No.

FILED: MAY 14, 2008

08CV2799 J.N.

JUDGE DOW JR.

MAG. JUDGE VALDEZ

## **NOTICE OF REMOVAL**

Cummins Inc. (“Cummins”), pursuant to 28 U.S.C. §§ 1332 and 1441, hereby files this Notice of Removal of the above-titled action to the United States District Court for the Northern District of Illinois, Eastern Division. The grounds for removal are as follows:

1. Plaintiff American Empire Surplus Lines Insurance Company (“American Empire” or “Plaintiff”) filed the above-referenced action in the Circuit Court of Cook County Illinois on April 8, 2008. Cummins was served with process on April 15, 2008. A copy of all process and pleadings related to this action are attached hereto as Exhibit A and incorporated herein by this reference.

2. This Notice of Removal is timely under 28 U.S.C. § 1446(b) having been filed within thirty days of the date Cummins received a copy of the initial pleading setting forth Plaintiff's claim for relief.

3. This Court has original jurisdiction over Plaintiff's Complaint based upon 28 U.S.C. § 1332 in that there exists complete diversity between Plaintiff and Defendant and the amount in controversy exceeds the sum or value of \$75,000 exclusive of costs and interest.

4. Upon information and belief, Plaintiff is a for-profit corporation organized under the laws of the State of Delaware with its principal place of business at 580 Walnut Street, 10th Floor, Cincinnati, Ohio, 45202. For purposes of 28 U.S.C. § 1332, therefore, Plaintiff is both a citizen of Delaware and Ohio.

5. Cummins is a for-profit corporation organized under the laws of the State of Indiana. Its principal place of business is 500 Jackson Street, Columbus, Indiana, 47201 – 3005. For purposes of 28 U.S.C. § 1332, therefore, Cummins is a citizen of Indiana.

6. Plaintiff seeks recovery of \$105,577.08 in damages allegedly incurred as a result of the failure of an engine manufactured by Cummins.

7. This action is not one described in 28 U.S.C. § 1445 and may be removed to this Court pursuant to the provisions of 28 U.S.C. § 1441.

8. Venue is appropriate in the United States District Court for the Northern District of Illinois, Eastern Division because the Circuit Court of Cook County, Illinois, where Plaintiff filed the state action, is located in this federal district. 28 U.S.C. § 1441(a).

9. Pursuant to 28 U.S.C. § 1446(d), Cummins will file a Notice of Filing of Notice of Removal with the clerk of the Circuit Court of Cook County, Illinois

contemporaneously with the filing of this Notice of Removal. A copy of the state court filing is attached hereto as Exhibit B and is incorporated herein by this reference.

10. Additionally, Cummins will serve, pursuant to 28 U.S.C. § 1446(d), a copy of the Notice of Removal on counsel for plaintiff, postage prepaid.

WHEREFORE, Cummins notifies this Court that this cause has been removed from the Circuit Court of Cook County, Illinois, to the United States District Court for the Northern District of Illinois, pursuant to the provisions of 28 U.S.C. §§ 1332, 1441 and 1446.

Respectfully submitted,

CUMMINS INC.

/s/ Brendan J. Healey

Brendan J. Healey  
MANDELL MENKES LLC  
bhealey@mandellmenkes.com  
333 West Wacker, Suite 300  
Chicago, Illinois 60606  
Telephone: (312) 759-2158  
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J. A. Felton  
Dan E. Cranshaw  
LATHROP & GAGE L.C.  
2345 Grand Boulevard  
Suite 2800  
Kansas City, Missouri 64108-2684  
Telephone: (816) 292-2000  
Telecopier: (816) 292-2001

ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that I filed a copy of the foregoing with the Clerk of the Court using the ECM/ECF system. I further certify that a copy of the foregoing was served on May 15, 2008 by first Class United States Mail, postage prepaid on the following counsel of record:

Robert Ostojic  
LEAHY, EISENBERG & FRAENKEL, LTD  
161 North Clark Street  
Suite 1300  
Chicago, IL 60601  
Telephone: (312) 368-4554

/s/ Brendan J. Healey  
An Attorney for Defendant

IN THE CIRCUIT COURT OF COOK COUNTY  
ILLINOIS COUNTY DEPARTMENT  
LAW DIVISION

AMERICAN EMPIRE SURPLUS LINES  
INSURANCE COMPANY, as subrogee of  
FROCK BROS. TRUCKING, INC.

Plaintiff,

vs.

CUMMINS, INC.

Defendants.

Case No. 2008 L 003799

08CV2799 J. N.

JUDGE DOW JR.

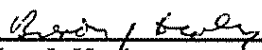
MAG. JUDGE VALDEZ

**NOTICE OF FILING NOTICE OF REMOVAL**

TO PLAINTIFFS HEREIN AND THEIR ATTORNEYS OF RECORD:

In accordance with 28 U.S.C. § 1446(d), defendant Cummins Inc. hereby notifies this Court and all parties that on May 14, 2008, it filed a Notice of Removal removing this action to the United States District Court for the Northern District of Illinois, Eastern Division. A true and correct copy of the Notice of Removal is attached hereto as Exhibit A.

Respectfully submitted,

  
Brendan J. Healey  
MANDELL MENKES LLC  
333 West Wacker, Suite 300  
Chicago, Illinois 60606  
Telephone: (312) 759-2158

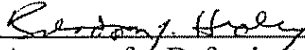
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ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on May 14, 2008 by first Class United States Mail, postage prepaid on the following counsel of record:

Robert Ostojic  
LEAHY, EISENBERG & FRAENKEL, LTD  
161 North Clark Street  
Suite 1300  
Chicago, IL 60601  
Telephone: (312) 368-4554

  
\_\_\_\_\_  
An Attorney for Defendant

2120 - Served  
 2220 - Not Served  
 2320 - Served By Mail  
 2420 - Served By Publication

SUMMONS

2121 - Served  
 2221 - Not Served  
 2321 - Served By Mail  
 2421 - Served By Publication

ALIAS - SUMMONS

CCG N001-10M-1-07-05( )

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
 COUNTY DEPARTMENT, LAW DIVISION

AMERICAN EMPIRE SURPLUS LINES  
 INSURANCE COMPANY, as subrogee of  
 FROCK BROTHERS TRUCKING, INC.

v.  
 CUMMINS, INC.

08CV2799 J. N.

JUDGE DOW JR.

MAG. JUDGE VALDEZ

Case No.: 2008 L 003799

PLEASE SERVE:

CUMMINS INC.

C/O ILLINOIS CORPORATION SERVICE C

801 Adlai Stevenson Drive

Springfield, Illinois 62703

## SUMMONS

To each Defendant:

YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance, and pay the required fee, in the Office of the Clerk of this Court at the following location:

☒ Richard J Daley Center, 50 W Washington, Room 801, Chicago, IL 60602

☐ District 2 - Skokie  
 5600 Old Orchard Rd  
 Skokie, IL 60077

☐ District 3 - Rolling Meadows  
 2121 Euclid  
 Rolling Meadows, IL 60008

☐ District 4 - Maywood  
 1500 Maybrook Ave.  
 Maywood, IL 60153

☐ District 5 - Bridgeview  
 10220 S. 76th Ave.  
 Bridgeview, IL 60455

☐ District 6 - Markham  
 16501 S. Kedzie Pkwy.  
 Markham, IL 60426

You must file within 30 days after service of this Summons, not counting the date of service.

IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE RELIEF REQUESTED IN THE COMPLAINT.

To the officer:

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This summons may not be served later than 30 days after the date of service.

WITNESS, \_\_\_\_\_

Leahy, Eisenberg &amp; Fraenkel, Ltd.

Atty. For: Plaintiff/Defendant (Strike one)

33 W. Monroe St., Suite 1100

Chicago, Illinois 60603

(312) 368-4554

Attorney No. 45875

Date of Service: \_\_\_\_\_  
 (To be inserted by officer on copy left with defendant or other person)

~~Service by Facsimile Transmission will be accepted at:~~ \_\_\_\_\_

(Area Code) (Facsimile Telephone Number)

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

AMERICAN EMPIRE SURPLUS LINES )  
INSURANCE COMPANY, as subrogee of )  
FROCK BROTHERS TRUCKING, INC., )

Plaintiff, )

v. )

CUMMINS, INC., )

Defendant. )

Case No.

2008L003799  
CALENDAR/ROOM C  
TIME 00:00  
Product Liability

COMPLAINT AT LAW

NOW COMES Plaintiff, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, by and through its attorneys, LEAHY, EISENBERG & FRAENKEL, P.C., and for its Complaint at Law against the Defendant, CUMMINS, INC., states as follows:

COUNT I  
(Strict Product Liability)

1. Plaintiff, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY ("American Empire") provided property insurance coverage to its insured, FROCK BROTHERS, INC. ("Frock Brothers") under Policy No. 3AP17906.

2. American Empire is the bona fide owner of the claims and causes of action set forth below having obtained same by reason of payment to or on behalf of its insured under its policy of insurance.

3. That at all times relevant, Defendant, Cummins, Inc., was an Indiana corporation, which conducts business in the state of Illinois and maintains an agent in the state of Illinois.

4. Defendant is a worldwide designer and manufacturer of diesel engines, among other products.



5. Prior to April 7, 2004, American Empire's insured purchased thirty Kenworth tractors and engines designed, engineered and manufactured by Defendant.

6. On April 7, 2004, a diesel tractor engine, designed, engineered, manufactured, distributed and sold by Defendant catastrophically failed, resulting in a fire that caused damage to a Kenworth tractor and Great Dane trailer owned by American Empire's insured.

7. The diesel engine manufactured, sold and distributed by Defendant was defective, unsafe and unreasonably dangerous for its intended use or uses in one or more of the following respects:

- a. Said diesel engine was defectively and/or improperly designed and/or assembled as to cause a structural collapse of the piston and piston sleeve component parts of said diesel engine;
- b. The piston and piston sleeve were not assembled and/or designed in a fire safe manner;
- c. That the diesel engine was not properly manufactured and designed so as to limit the potential for failure of the piston and piston sleeve; and
- d. There were no adequate tests or other quality control measures conducted on the diesel engine so as to ensure it was properly assembled so as to avoid the potential for causing fire.

8. As a direct and proximate result of one or more of the foregoing unreasonably dangerous conditions, the piston and piston sleeve failed in a catastrophic manner resulting in the fire which communicated to the Kenworth tractor and Great Dane trailer, causing severe and extensive damage all to the ultimate loss and damage of American Empire.

WHEREFORE, Plaintiff, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, as subrogee of FROCK BROTHERS, INC., respectfully requests for judgment against Defendant, CUMMINS, INC., in the amount of \$105,577.08, together with costs incurred.

## COUNT II

1. Plaintiff, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY ("American Empire") provided property insurance coverage to its insured, FROCK BROTHERS, INC. ("Frock Brothers") under Policy No. 3AP17906.

2. American Empire is the bona fide owner of the claims and causes of action set forth below having obtained same by reason of payment to or on behalf of its insured under its policy of insurance.

3. That at all times relevant, Defendant, Cummins, Inc., was an Indiana corporation, which conducts business in the state of Illinois and maintains an agent in the state of Illinois

4. Defendant is a worldwide designer and manufacturer of diesel engines, among other products

5. At all times relevant, Defendant held itself out as having the requisite expertise and knowledge to design, manufacture and sell diesel engines.

6. Based on the professed expertise and representations of Defendant, American Empire's insured purchased Defendant's diesel engines for use with its Kenworth tractors.

7. That at all times pertinent, Defendant manufactured, sold and distributed diesel engines which it represented were safe for use by the general public.

8. At all times herein pertinent, Defendant had a duty to manufacture, sell, design and distribute its diesel engines in a careful and prudent manner and pursuant to applicable industry standards so as to protect and guard against the possibility of fire and fire related damage to the lives and property of others.

9. On April 7, 2004, a diesel tractor engine, designed, engineered, manufactured, distributed and sold by Defendant catastrophically failed, resulting in a fire that caused damage to a Kenworth tractor and Great Dane trailer owned by American Empire's insured.

10. That Defendant breached its duty of care in one or more of the following careless and negligent ways:

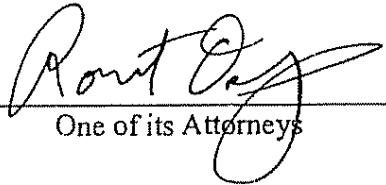
- a. Said diesel engine was defectively and/or improperly designed and/or assembled as to cause a structural collapse of the piston and piston sleeve component parts of said diesel engine;
- b. The piston and piston sleeve were not assembled and/or designed in a fire safe manner;
- c. That the diesel engine was not properly manufactured and designed so as to limit the potential for failure of the piston and piston sleeve; and
- d. There were no adequate tests or other quality control measures conducted on the diesel engine so as to ensure it was properly assembled so as to avoid the potential for causing fire.

11. That as a direct and proximate result of one or more of the foregoing unreasonably dangerous conditions, the piston and piston sleeve collapsed in a catastrophic manner resulting in the fire which communicated to Kenworth tractor and Great Dane trailer, causing severe and extensive damage all to the ultimate loss and damage of American Empire.

WHEREFORE, Plaintiff, AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, as subrogee of FROCK BROTHERS, INC., respectfully requests for judgment against Defendant, CUMMINS, INC., in the amount of \$105,577.08, together with costs incurred.

Respectfully submitted,

AMERICAN EMPIRE SURPLUS LINES  
INSURANCE COMPANY

By:   
One of its Attorneys

Robert Ostojic  
LEAHY, EISENBERG & FRAENKEL, LTD.  
161 North Clark Street  
Suite 1300  
Chicago, Illinois 60601  
312/368-4554  
Attorney No. 45875

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